FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. ~~1004~~. 65

UNITED STATES, *Petitioner*,

v.

CALLAHAN WALKER CONSTRUCTION COMPANY.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

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April, 1942.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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No. 1094.

UNITED STATES, *Petitioner*,

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CALLAHAN WALKER CONSTRUCTION COMPANY.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

The question presented by the assignments of error is one of law and deals with the construction of the provision of Article 3 of the contract of August 27, 1931 which sets up a standard under which the amount of compensation for extra work, not covered by the contract, is to be determined before the contract is modified so as to include such extra work. (See Article 3 of the Contract, R. p. 64).

The specifications of the contract provided for the building of an earth fill levee to control the flood waters of the Mississippi River; and the change made in the specifications by the contract officer on October 18, 1932 was for the construction of an added riverside and landside false berm

between Stations 5123 and 5113 on the Lake Lee Setback Levee to support the natural foundation of the levee at those stations (R. p. 61 et seq.).

It is, of course, admitted by the petitioner that a change was made in the specifications of the contract when the construction work reached Station 5123 of Item A of the levee; and that such change was of a character which caused a substantial increase in the amount otherwise due under the contract at the unit price of 14.43c per cubic yard (R. pp. 6 & 7).

The contracting officer made the change in specifications because he thought that Paragraph 14 of the specifications gave him the power to do so (R. p. 29); but admits that he refused to make any adjustment with the contractor to cover its actual cost in performing the extra work covered by the change ordered as provided by Article 3 of the contract (R. pp. 27 & 64).

There is no dispute in the evidence that the *actual cost* of doing the extra work ordered by the contracting officer is the amount of $13,989.92 (R. p. 18) over and above the contract price of 14.43c per cubic yard under the standard fixed by Article 3 of the contract; but that in defiance of the standard fixed by Article 3 of the contract for arriving at an *equitable adjustment* to cover said amount by a modification of the contract, the contracting officer sought to incorporate the extra work in the main contract and apply the contract price of 14.43c per cubic yard for such extra work ordered (R. p. 6). This, as the Court of Claims holds, is a breach of Article 3 of the contract.

The contractor protested against such construction of the contract, and demanded that the contracting officer modify the contract in writing so as to make an equitable adjustment for the extra work at *actual cost*, plus 15% of such cost for supervision (R. p. 58), which it deemed to be equitable under the standard fixed for such extra work under Article 3 of the contract; and upon the absolute refusal of the contracting officer to observe such standard, the

contractor notified the contracting officer that it would stand upon its legal rights under the contract and would submit a statement of its *actual cost* of such extra work (R. p. 59). The contractor had no other alternative; and there is no dispute of fact over the amount of the extra cost incurred (R. p. 11).

The decision of the contracting officer that the unit contract price of 14.43c per cubic yard should be applied to the material placed in the added riverside false berm, irrespective of the probability that the placing of said material might cost the contractor more or less than that amount per cubic yard, was not an "equitable adjustment" of the actual cost of said extra work to the contractor; nor was it the determination of *a disputed question* of fact. The petitioner has never disputed the amount of the extra cost incurred by the contractor under said change order (R. p. 11).

At the time the change in specifications was thought necessary by the contracting officer there was no *fact question* in existence about which there could be a dispute with the contractor, and the contracting officer having ordered extra work performed without making any provision in his order to *modify the contract* or pay the extra cost that the contractor might incur, the right of the contractor to recover the amount of its actual extra cost incurred, as found by the Court of Claims, is clearly a question of law. (See *Henderson Bridge Company* v. *McGrath*, 134 U. S. 260, 33 L. Ed. 934). There is an implied promise on the part of petitioner, under the provisions of Article 3 of the contract, that the respondent be paid an *adequate* and *equitable* amount to cover the actual cost of extra work. (See Article 3, R. p. 64).

The contracting officer was not authorized under the contract to order extra work without making an equitable adjustment of the amount by which the contract price of 14.43c per cubic yard was increased or decreased, nor did he have the right to construe the contract as giving him authority

to impose his will upon the contractor; or to modify the provisions of the contract without the consent of the contractor in such a way as to make his decision *conclusive* as a matter of law.

The evidence submitted to the Court of Claims was for the purpose of showing that the contract had been modified without the consent of respondent and it had been damaged in a substantial amount by the breach of Article 3 of the contract by the contracting officer; and that the petitioner was attempting to hold and retain property and benefits obtained from the respondent without due process of law or the payment of just, equitable and reasonable compensation therefor. (See *Henderson Bridge Company* vs. *McGrath*, supra).

The petitioner seeks to defend the claim of respondent by attempting to show that the contracting officer's breach of the contract was based upon a "finding of fact by him" before the change was ordered that no extra cost would be incurred by the contractor in carrying out his order of October 18, 1932. The contract nowhere provides that the contracting officer may make such a decision, or that extra work shall be done at the contract price of 14.43c per cubic yard; but does specifically provide that where the cost of extra work increases or decreases the amount legally due under the contract at the unit price of 14.43c per cubic yard, that an "equitable adjustment" in the contract price of 14.43c per cubic yard *shall be made.*

An absolute refusal to make such adjustments, under the standard fixed by the contract, presents a question of law (see *United States* vs. *Smith*, 256 U. S. 11). Furthermore, the unit price of 14.43c per cubic yard is not the *standard of compensation or the cost of extra work*, and as a matter of law, the contracting officer erred in fixing such price as the standard for extra work. The petitioner is unable to show that respondent agreed to said price per cubic yard for the extra work, but admits that respondent did not so agree.

The position of the petitioner is that inasmuch as the contracting officer was required as a matter of law to make an adjustment in the contract price of 14.43c per cubic yard that would entitle the respondent to an amount for the extra work suffcient to compensate for the actual cost thereof; that his admitted failure to do so as Article 3 of the contract required does not present a question of law. (See *United States* v. *Smith*, 256 U. S. 11.) The argument of the petitioner is self destructive.

In order for the respondent to assert its legal rights under the contract it was required to show that it had been damaged by the illegal conduct of the petitioner; but the question with reference to the amount of said damage was a question of fact to be settled by the Court of Claims, under the question of law which the petitioner admits is presented by the construction which the contracting officer erroneously assumed he could properly make of the contract.

It is respectfully insisted that the Court of Claims has not departed from a well-settled principle of law governing contracts to which the United States is a party; and there does not appear to be any reason why the petition for writ of certiorari should be granted in this case.

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